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# HIGHLIGHTS

*Ontario Labour Relations Board*

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November 2006

## Holiday Season Board Schedule

Please see the attached notices to the community.

## Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in October of this year. These decisions will appear in the September/October issue of the OLRB Reports. The full text of recent OLRB decisions is now available on-line through the Canadian Legal Information Institute at www.canlii.org.

**Construction Industry Grievance** – In this referral by Local 1059 of a compilation of a number of grievances, the Board dealt with three issues raised as preliminary objections by Aecon: whether the Local is party to the collective agreement; whether sections 48 and 133 override any restrictions on grieving that may be contained in the collective agreement; whether article 2.03 of the collective agreement requires these types of grievances to be filed by the OPDC only – On the first issue the Board agreed with *Double S Construction* and found that both the Local and OPDC are parties in their own right to the collective agreement – On the second issue the Board found that article 2.03 does not purport to make a grievance inarbitrable, but rather purports to identify whether the Local or OPDC has carriage of a particular type of dispute – The Board found that this type of restriction was no different from those cases that required certain types of grievances to be filed by employees rather than by the union, and found that the article did not offend either s. 48 or 133 – On the final issue the Board found that while the Local had a right to file the grievances, once Aecon's defence raised issues of the interpretation, application or jurisdiction of the collective agreement, then OPDC must be made a party to the referral – Direction to make OPDC a party to the proceeding – Matter continues

**AECON CONSTRUCTION & MATERIALS LIMITED;** RE LIUNA LOCAL 1059; File No. 2006-06-G; Dated October 24, 2006; Panel: David A. McKee (10 pages)

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**Certification – Construction Industry – Practice and Procedure – Reconsideration** – Broccolini Construction asked the Board to reconsider its decision to certify a unit of carpenters and carpenter's apprentices – Broccolini did not file a response to the application for certification when it first received the application, mistakenly believing the certification application only applied to a subcontractor under its employ – Broccolini did not forward the certification application materials to the subcontractor – Following the issuing of the certificate, Broccolini filed a reconsideration application and sought to litigate the issue before the Board, alleging it was not the employer of the employees on the certificate – The Board found there was a heavier burden of persuasion on a party seeking reconsideration where a certificate has been issued and questioned why Broccolini had made no effort whatsoever to respond to the initial certification application – Consequently, the Board declined to reconsider its decision to certify the union.

**BROCCOLINI CONSTRUCTION (ONTARIO) INC.**; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 93; File No. 1467-06-R; Dated October 5, 2006; Panel: David A. McKee; John Tomlinson; Richard Baxter (3 pages)

**Bargaining Unit – Certification – Construction Industry – Membership Evidence – Timeliness** – After the two-day time limit under 128.1(3) had lapsed City Core filed a revised list that included three additional names – The union challenged the inclusion of two of these individuals, arguing City Core was statutorily prohibited from adding names after the two day time limit under 128.1(3) had lapsed – In regard to the third employee, the union did not challenge this employee's inclusion on the list as both sides had agreed he was to be included during a subsequent Regional Certification meeting – The Board found that City Core was prohibited from adding names to its list of employees after the expiry of the two day statutory period – The Board, however, permitted the inclusion of the third employee as neither party had challenged City Core's addition of this employee's name during the Regional Certification meeting and the Union would have been permitted to add the third employee to the list if City Core had not already done so – Matter continues

**CITY CORE MECHANICAL LTD.**; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 46; File Nos. 4130-05-R; 0302-06-U; Dated October 12, 2006; Panel: Susan Serena (8 Pages)

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**Certification – Construction Industry – Practice and Procedure – Unfair Labour Practice** – In response to the union's application for certification, accompanied by a request for relief under section 11, the employer provided a materially significant 8.1 notice – The union asked that no representation vote be held (notwithstanding a finding of not less than forty percent of the individuals in the bargaining unit proposed in the application) until its s. 11 relief was determined, however the Board found that s. 8(2) requires that a representation vote be taken – Finally, although the employer consented to the counting of the ballots, given that the union had sought a delay in the representation vote, the Board was uncertain whether the union consented to the ballots being counted and ordered the ballot box sealed until the Board so orders or the parties agree – Matter continues

**EAST ELGIN CONCRETE FORMING LIMITED**; RE LIUNA LOCAL 1059; File Nos. 2254-06-R; 2278-06-U; Dated October 30, 2006; Panel: Harry Freedman (5 pages)

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**Construction Industry – Jurisdictional Dispute – Sector Determination** – Two sector determination applications were heard together to determine whether two construction projects came within the ICI or the electrical power systems sector (EPS) – The Board considered the meaning and scope of the EPS sector classification – The two construction projects were private sector initiatives aimed at assembling, erecting and installing sixty-six wind turbine electric generators with various affiliated transmission lines, transformers and substations – In examining whether or not the scope of the EPS sector should be restricted to projects taking place on what was once Ontario Hydro property, the Board reviewed the historical reasons for the creation of different construction industry sectors under the *LRA* – While the Board acknowledged that the 1978 Ellis Report indicated the primary focus of the EPS sector was traditionally on public sector power generation projects, the Board found the scope of the EPS sector was broad enough to include privately owned and developed construction projects and went beyond construction work done on what was once the property of Ontario Hydro – After determining that the scope of the EPS sector may include privately owned and operated construction projects, the Board considered which sector was more appropriate for the projects – Both the 'end use' of a construction industry project and the collective bargaining patterns of contractors were found to be relevant – As private power generation initiatives were a relatively new phenomenon, the Board recognized bargaining patterns for these kinds of projects had not yet had sufficient time to develop and emerge – As a result greater reliance was placed on the two projects' end use – While the applicant argued the projects' end use had a commercial aspect suggesting an ICI sector classification, the Board found the projects' end use to be predominantly aimed at the generation and transmission of power – Consequently, the two projects were deemed
to fall within the EPS sector.

**LEO ALARIE AND SONS LIMITED; BLACK AND MCDONALD LIMITED**; RE LIUNA AND LIUNA ONTARIO PROVINCIAL DISTRICT COUNCIL; RE GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS, LOCAL 446; RE IUOE LOCAL 793; RE CANADIAN UNION OF SKILLED WORKERS; RE UNIVERSAL WORKERS' UNION, LOCAL 183; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 736; RE IBEW; RE CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

AND ITS LOCAL 1592; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION; File Nos. 4126-05-M; 4162-05-M; Dated October 31, 2006; Panel: Harry Freedman; John Tomlinson; Alan Haward (15 pages)

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**Employment Standards** – The employer sought review of an order to pay for the sole purpose of setting aside the statutory administrative fee, taking the position that the employment standards officer ought to have provided it with an opportunity to pay the amount of the outstanding wages prior to issuing the order – The Board noted that the Act provides, and Branch policy recognizes, that an officer has discretion to afford an employer an opportunity to pay voluntarily, before issuing an order that attracts an administrative fee – Although on the record it was not apparent to the Board why the officer did not provide the employer with an opportunity to make a voluntary payment, the Board found that even if it had the jurisdiction to review the officer's exercise of discretion, it would not be appropriate in this case because: the employer took no steps to pay the arrears even though it knew unpaid holiday pay was owing; it only paid the arrears as a result of an audit; and the payment was not made promptly or even within thirty days – Order to pay affirmed

**LOUIE'S PIZZERIA & RESTAURANT**; RE BARBARA L. DAVIES ET AL AND DIRECTOR OF EMPLOYMENT STANDARDS; File No. 3158; Dated October 2, 2006; Panel: Ian Anderson (5 pages)

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**Bargaining Unit – Certification – Construction Industry** – LIUNA applied for ICI certification and two weeks later made a non-construction industry application for certification with respect to the same employees – The Board addressed two preliminary issues: whether the applicant was entitled to file "overlapping" applications and whether the applicant must show that at least two persons were at work on the day of application in the ICI sector – With regard to the first issue, while the Board confirmed that the same employees are not normally entitled to be members of two different bargaining units in applications brought on the same day, the Board held that LIUNA's two applications filed on different days did not amount to an abuse of process – The Board found the asserted overlap was a consequence of Swift's contention that many of the employees in the construction application did not perform construction work – With regard to the second issue, despite Swift's suggested alternate interpretation of s. 158(1), the Board found the section did not require at least two employees to be at work in both ICI and non-ICI sectors of the unit on the application date – The Board found this would contradict the statutory provision constituting both ICI and non-ICI workers as a single 'unit' for the purposes of the assessment of a certification application – Matter continues.

**SWIFT RAILROAD CONTRACTORS CORPORATION**; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICAN ONTARIO PROVINCIAL DISTRICT COUNCIL; File No. 4237-05-R; Dated October 4, 2006; Panel: Corinne Murray (9 Pages)

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## Court Proceedings

**Certification – Construction Industry – Judicial Review – Practice and Procedure – Reconsideration** – The Board certified the union pursuant to s. 128.1 after the City failed to file its response within the time stipulated by the Act and the Board's Rules – The City applied for reconsideration of the Board's decision on the main ground that the union improperly delivered its application to the wrong facsimile number – The union alleged that it received the facsimile number from the assistant to the City's Supervisor – The Board found that an organization bears the risks that comes with how it receives or handles faxes in the ordinary course of business, however if the City disputed the assertion that the union received the facsimile number from the Supervisor's assistant, it must make submissions on this to the Board – The Board dismissed the request for reconsideration, subject to receiving information from the City with respect to the assistant [Editor's note: no additional submissions were made by the City]

On a motion by the union to strike all or parts of an affidavit sworn in support of the judicial review application, the court noted that there are rare and exceptional cases for the admission of an affidavit on an application for judicial review in circumstances where the content of the affidavit was not before the Board – In these circumstances however, the court concluded that the City was correct in its assertion that its affidavit properly provided evidence that may establish the Board's denial of natural justice to the City, and given the precedent for the admission of affidavit evidence to show denial of natural justice, the court found the City was entitled to establish its case through this evidence – Motion to strike dismissed [Editor's note: Motion to Appeal has been filed]

**CITY OF HAMILTON**; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18 AND ONTARIO LABOUR RELATIONS BOARD; 1785-05-R; Court File No. 209/06; Dated October 24, 2006; Panel: Macdonald, J.

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The decisions listed in this bulletin will be included in the publication Ontario Labour Relations Board Reports. Copies of advance drafts of the OLRB Reports are available for reference at the Ontario Workplace Tribunals Library, 7th Floor, 505 University Avenue, Toronto.

# Pending Court Proceedings

| Case name & Court File No. | Board File No. | Status |
|---|---|---|
| **Comstock Canada et al** v. United Association of Journeymen and Apprentices in the Plumbing and Pipefitting Industry of the United States and Canada, Local 527 Divisional Court No. 522/06 | 2558-03-JD | Pending |
| Janet Kitson v. OLRB et al<br>Divisional Court No. 492/06 | 4205-02-U | Pending |
| **Maystar General Contractors Inc.** v. The International Union of Painters and Allied Trades, Local Union 1819 Divisional Court No. 481/06 | 0812-06-R | December 6, 2006 |
| **Johnson Controls Ltd.** v. Brookfield Lepage<br>Divisional Court No. 406/06 | 1634-04-R | January 24, 2007 (motion) |
| **TTC** v. Amalgamated Transit Union<br>Divisional Court No. 261/06 | 0618-06-U; 0620-06-U | Pending |
| **Abduraham, Abdoulrab** v. Novaquest Finishing<br>Divisional Court No. 327/06 | 2222-04-ES, 2223-04-ES, 2224-04-ES | Pending |
| **C.M.G. Innovation Co.** v. Ontario Pipe Trades Council and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 819 Divisional Court No. 06-DV-1234 OTTAWA | 0652-03-R | November 23, 2006 |
| **D.M.S. Concrete & General Contracting** v. Plasterer's Local 598<br>(Stated Case) Divisional Court No. 326/06 | 0330-06-G | December 7, 2006 |
| **D.M.S. Concrete & General Contracting** v. Plasterer's Local 598<br>(Stated Case) Divisional Court No. 254/06 | 4212-05-G; 4213-05-G | December 7, 2006 |
| **Place Mont Roc** v. United Steelworkers<br>(Stated Case) Divisional Court No. 233/06 | 1684-05-U; 3719-05-U | Pending |
| **City of Hamilton** v. Carpenters, Local 18<br>Divisional Court No. 209/06 | 1785-05-R | Pending |
| **Guild Electric Limited et al** v. IBEW, Local 1739<br>Divisional Court No. 202/06 | 4179-05-U; 4307-05-M | January 10, 2007 |
| **Elena, De Monelli Foerster** v. Toronto Catholic District School Board<br>(Civil Suit) Divisional Court No. 06-CV-310231PD1 | 1373-04-U | March 19, 2007 |
| **Bricklayers Local 7** v. 921879 Ontario Ltd. et al<br>Divisional Court No. 06-DV-1209 OTTAWA | 3261-04-JD; 3504-04-JD | April 3, 2007 |
| **Gus Nedelkopoulos** v. OLRB<br>Divisional Court No. 78978/06 NEWMARKET | 1838-05-U<br>2644-05-U | Pending |
| **Greater Essex County District School Board** v. International Brotherhood of Electrical Workers, Local 773 et al<br>Divisional Court No. 126/06 | 1702-04-R; 3120-04-R; 3172-04-R; 3173-04-R; 3174-04-R | August 15, 2006 (reserved) |
| **Kostantinos Iaonnidis** v. Amalgamated Transit Union, Local 1572, Corp. of City of Mississauga, Transportation and Works Dept., Transit Division<br>Divisional Court No. DC 0500947400 | 2287-04-U | August 30, 2006 (reserved) |
| **United Brotherhood of Carpenters** v. United Brotherhood of Carpenters, Local 93<br>Divisional Court No. 01/06 | 2069-05-U;<br>3055-05-M | Pending |
| **Gus Nedelkopoulos** v. OLRB<br>Divisional Court No. 77287/05 NEWMARKET | 3704-04-U | Dismissed – October 30, 2006 |

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| **Century Bldg. Restoration Inc.** v. Universal Workers Union LIUNA Local 183, et al<br>Divisional Court. No. 76931/05 NEWMARKET | 1880-04-G | Pending |
| **Mississaugas of Scugog Island First Nation** v. Great Blue Heron et al<br>Divisional Court No. 10/04 | 1271-03-U; 1336-03-M; 1414-03-M | Dismissed – May 31, 2006, leave to appeal to C.A. granted – Oct. 30/06 |
| **Grantley Howell** v. OLRB<br>Divisional Court No. 04/178 HAMILTON | 0933-01-U; 1273-01-U 3552-00-U | Dismissed – April 3, 2006, seeking leave to appeal to C.A. |
| **Scaduto, Frank**<br>Divisional Court No. 382/05 | 1798-03-U; 4338-02-U | Jan/Feb. 2007 |
| **Tuquabo, Dawitt**<br>Divisional Court No. 03-DV-000935 | 2377-02-U | Dismissed Feb. 14/05; leave to appeal dismissed Jun 29/05; seeking leave to S.C.C. |